

# CHAPTER 31

## PROFESSIONAL RESPONSIBILITY

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***Professional Responsibility***

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## **OUTLINE OF INSTRUCTION**

### **I. GOALS OF INSTRUCTION.**

- A. Identify the Rules that apply to Reserve Component Judge Advocates.
- B. Understand the duties of supervisory Judge Advocates.
- C. Investigate current ethical issues in Army practice.
- D. Understand rules regarding referral and fee arrangements that apply to Reserve Component Judge Advocates.
- E. Understand the professional responsibility discipline system.

### **II. REFERENCES.**

- A. Primary.
  - 1. AR 27-26, Rules of Professional Conduct for Lawyers (1 May 1992).
  - 2. American Bar Association Model Code of Professional Responsibility (1970 and amendments).
  - 3. American Bar Association Model Rules of Professional Conduct (4<sup>th</sup> ed. 1999).
  - 4. American Bar Association Standards of Criminal Justice (2d. ed.).
  - 5. American Bar Association Code of Judicial Conduct (1972 ed.).
- B. Secondary.
  - 1. AR 27-1, *Legal Services - Judge Advocate Legal Service* (3 Feb 95).
  - 2. AR 27-3, *Legal Services - The Army Legal Assistance Program* (10 Sep 95).

3. AR 27-10, *Legal Services - Military Justice* (24 Jun 96).

### **III. APPLICABLE STANDARDS.**

#### **A. The Importance of Knowing the Standards**

1. Failure to comply with obligations and prohibitions imposed by a Rule is a basis for discipline. AR 27-26, para. 7f.
2. Courts have found that professional malpractice can form the basis for a charge of dereliction of duty. *See United States v. Rust*, 38 M.J. 726, 728 (AFCMR 1993), *aff'd* 41 M.J. 472 (CAAF 1995) (Holding that “medical malpractice by an officer whose military duties require him to provide medical care may be punished as dereliction of duty under Article 92(3), UCMJ, 10 U.S.C. § 892(3).”)
3. Resolving conflicts between the lawyer’s duties to client, the law and legal system, and her own beliefs. *See* AR 27-26, para. 6g.

#### **B. Army Rules of Professional Conduct. Apply to all judge advocates and civilian attorneys working under approval authority of The Judge Advocate General.**

1. The Army Rules also apply to civilian attorneys practicing before tribunals conducted pursuant to the UCMJ and the Manual for Courts-Martial.
2. Army Rules apply to all Reserve Judge Advocates while performing duties under the cognizance of TJAG.

#### **C. Scope of the Rules.**

1. Provide a basis for taking action should a lawyer fail to comply or meet the standard. Do not provide a basis for a civil cause of action against either the Army or an attorney.
2. Comments are non-binding guidance.

3. The Army Rules are only one source of rules governing the conduct of judge advocates (*See, e.g.,* UCMJ, Joint Ethics Regulation, JAGC Personnel Policies).
- D. Other Applicable Standards.
1. ABA Standards for Criminal Justice.
  2. Regulatory and statutory standards (e.g., UCMJ, Joint Ethics Regulation, JAGC Personnel Policies).
  3. Ethics opinions and standards promulgated by State Bar and TJAG.
  4. Another state's ethical standards if the attorney is licensed to practice or practicing within another jurisdiction.
- E. Limiting Applicability of State Rules
1. Attempts to Exempt Federal Lawyers from State Rules Fail: “[N]othing in any of these sections expressly or impliedly gives the Attorney General the authority to exempt lawyers representing the United States from the local rules of ethics which bind all other lawyers appearing in that court of the United States.” *United States ex. rel. O’Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8<sup>th</sup> Cir. 1998), *reh ’g and suggestion for reh ’g en banc denied* (April 8, 1998).
  2. Citizens Protection Act of 1998 (Pub. L. No. 105-277)
    - a. Known informally as the "McDade Amendment"
    - b. Makes federal lawyers (for DOJ) subject to state laws and rules as well as to local federal court rules governing lawyer conduct
    - c. Contained in the Justice Department appropriations provisions in the massive Omnibus Consolidated and Emergency Supplemental Appropriations bill for fiscal year 1999 (Pub. L. No. 105-277), which President Clinton signed Oct. 21

- d. The new law specifically directs the attorney general to "make and amend rules of the Department of Justice to assure compliance with this section."

F. Resolving Ethical Conflicts.

- 1. Military Rule 8.5 provides that although attorneys remain subject to the Rules in effect in their licensing jurisdictions, the Military Rules supersede in case of a conflict.
- 2. ABA Model Rule (old approach in comment to Model Rule 8.5).
  - a. Apply principles of conflicts of laws.
  - b. Most significant relationship test.
- 3. ABA Model Rule 8.5 as amended August 1993. Disciplinary Authority must make a choice of law:
  - a. For conduct in connection with a court action - apply the rules of the jurisdiction where the court sits.
  - b. For other conduct - apply the rules of the jurisdiction in which the lawyer principally practices.

G. Practical Approach.

- 1. Follow the most restrictive rule.
- 2. Seek alternate solutions.
  - a. Request that a different attorney be appointed to the case.
  - b. Request an opinion or waiver from the state ethics review panel.  
**CAUTION:** Coordinate with technical chain of command.
  - c. If the conflict is irreconcilable - follow Army Rule 8.5 which states it is controlling.

#### **IV. DUTIES OF SUPERVISORS AND SUBORDINATES.**

- A. Supervisors Must Ensure Subordinates Comply With Rules (Rule 5.1).
  - 1. Includes non lawyers under supervision. *See* Rule 5.3 and volunteers in legal offices, AR 27-3, para. 4-3*e*.
  - 2. Staff Judge Advocates should provide practice-oriented classes on professional responsibility. *See* AR 27-1, para. 7-2*c*.; AR 27-3, paras. 1-4*g*(2)(j) & 2-4*a*.
  - 3. A Supervisor Assumes Imputed Responsibility for Acts of Subordinates if (s)he:
    - a. Orders or ratifies a subordinate's violation, or,
    - b. Fails to take remedial action to avoid or mitigate the consequences of a violation.
- B. Subordinates Are Bound by the Rules of Professional Conduct (Rule 5.2).
  - 1. Subordinate may rely on ethical judgment of a supervisor if the issue is subject to question.
  - 2. If the ethical question can be answered only one way, subordinate must comply with the Rules even if supervisor directs a contrary course of conduct.
  - 3. When representing individual clients, subordinates are required to exercise unfettered loyalty and professional independence (Rule 5.4(e)).

## **V. CURRENT ETHICAL ISSUES.**

### **A. Confidentiality (Rule 1.6).**

1. General rule. A lawyer shall not reveal any information relating to the representation of a client.
  - a. No distinction between confidences and secrets.
  - b. Applies to information obtained prior to formation of attorney-client relationship.
  - c. Applies to all office personnel, including volunteers.
  - d. Supervisors should ensure procedures are in place to ensure confidentiality. AR 27-3, para. 4-9b(4).
    - (1) Separate administrative and confidential files. AR 27-3, para. 5-5c.
    - (2) *See also*, OTJAG Standards of Conduct Office, *Professional Responsibility Note*, ARMY LAW, Oct. 1993, at 47-48. (State bar opinions regarding management of office waste and FAX machine security).
    - (3) SRP Confidentiality.
    - (4) E-mail/Technology Concerns
2. Exceptions to confidentiality.
  - a. A client may consent to disclosure of confidences (Rule 1.6). AR 27-3, para. 4-8a strongly suggests having authorization in writing.
  - b. Disclosure is also authorized when needed to carry out the representation.
    - (1) Office communications.

- (2) Reading files.
  - (a) Supervisors of LAA's are permitted to review office files to ensure adequate legal representation.
  - (b) Both supervisors and subordinates need to be sensitive to potential for conflicts of interest inherent in reviewing reading files.
- c. Disclosure is permitted to establish a claim or defense in a controversy with a client.
- d. Intention to commit a crime. Army Rule 1.6(b)(1) mandates disclosure of information a lawyer reasonably believes necessary to prevent a client from committing a crime which is likely to--
  - (1) result in imminent death or substantial bodily harm, or
  - (2) impair the readiness or capability of a military unit, vessel, aircraft, or weapon system.
  - (3) There is no authority for revealing information of other potential offenses under the Army Rules.

B. The Lawyer as Advisor.

- 1. Lawyers Should Provide Complete Advice.
  - a. A lawyer may refer to moral, economic, social, and political factors when rendering advice to clients (Rule 2.1).
  - b. Rule 2.1 sets forth a permissive standard.
- 2. Lawyers Must Provide Independent Advice.
  - a. When advising individual clients, lawyers are required to exercise unfettered loyalty and professional independence (Rules 2.1 and 5.4).

- b. A lawyer who cannot provide independent advice must seek to withdraw from the representation of an individual client.
  - c. LAAWS-LA software represents Army policy on the proper form of documents, but is not a substitute for an attorney's independent professional judgment. AR 27-3, para. 4-4a.
- C. Army as the Client (Rule 1.13).
  - 1. Provides that the Army, acting through its authorized officials, is the client.
  - 2. Rule rejects the concept that the government as a whole is the client.
  - 3. Attorneys may be authorized to represent individual clients as legal assistance attorneys (AR 27-3) or as Trial Defense Attorneys (AR 27-1).
  - 4. If an official of the military (e.g., a commander) is acting illegally or intends to act illegally, and if the action reasonably might be imputed to the military, the lawyer shall:
    - a. Proceed as is reasonably necessary in the best interest of the applicable service.
    - b. Consider taking the following measures:
      - (1) Ask the official to reconsider.
      - (2) Advise the official to get a separate legal opinion.
      - (3) Advise the official that his or her personal legal interests are at risk and he or she should consult counsel.
      - (4) Refer the matter to or seek guidance from higher authority in the technical chain of supervision.
    - c. If unsuccessful in taking these efforts, the Army lawyer may terminate representation with respect to the matter in question.

- d. Rule 1.13 does not require that an attorney report the official's misconduct or violation of law. A requirement to disclose misconduct may arise, however, under other laws or regulations. *See, e.g., Joint Ethics Regulation.*

D. Fees and Self-Referral (Rule 1.5).

- 1. A lawyer shall not accept a gratuity, salary or other compensation from a client for services performed as an officer of the U.S. Army.
- 2. A lawyer shall not receive compensation for making a referral of a client to a private practitioner.
- 3. A RC Legal Assistance Attorney shall not receive any actual or constructive compensation or benefit for referring to a private-practitioner (including himself) a matter the lawyer first became involved with in a military legal assistance capacity. Comment to Rule 1.5, *see also*, AR 27-26, para. 4-5*d,e* (legal assistance referrals to RC attorneys in RC Directory will be on a no-fee basis), 4-7*d* (no LAA authorized to accept a gratuity for Legal Assistance Services).
  - a. Does not subsequently prohibit a reserve component lawyer from representing military personnel or dependents in a private capacity concerning new matters.
  - b. Prohibits lawyer from using official position to solicit or obtain clients for private practice.
- 4. An RC Judge Advocate, whether listed in the RC Directory or not, may accept a referral EITHER for retirement points (no fee) or for a fee.
  - a. "Same General Matter" is the key. Items that fall within the same area of the legal assistance program (*See* para. 3-6, AR 27-3) are considered the same general matter. Para. 4-7*d*.(2), AR 27-3.
  - b. If the RC Judge Advocate accepts the case as a legal assistance case (for points, no fee)
    - (1) The attorney must see the accepted action through to completion without charging a fee.

- (2) The attorney may not charge a fee to represent that client on “the same general matter” as the accepted legal assistance case. (They may represent them on a no fee basis).
  - c. If the RC Judge Advocate accepts the referral from and AC LAA for a fee, the attorney must,
    - (1) Acknowledge the fact that the referral is for fee *at the outset of representation*,
    - (2) Ensure that the client fully understands the referral is for fee at the outset of representation, and,
    - (3) Obtain client consent to the representation.
- E. Conflicts of Interest (Army Rules 1.7, 1.8 & 1.9).
  - 1. Directly adverse to the current client . A lawyer shall not represent a client if the representation of the client will be directly adverse to another client unless
    - a. the lawyer reasonably believes the representation will not adversely affect the other relationship, and
    - b. each client consents after consultation (Army Rule 1.7(a)).
    - c. If a conflict develops after representation has been undertaken, the attorney must seek to withdraw. The Army Rules adopt an objective approach. Relevant factors in determining whether multiple representation should be undertaken include:
      - (1) duration and intimacy of the lawyer's relationship with the clients involved,
      - (2) likelihood actual conflict will arise, and

- (3) likely prejudice to the client if conflict does arise.
- d. Potential conflicts in legal assistance:
  - (1) Estate planning.
  - (2) Debtor-creditor and seller-purchaser. *Compare Atlantic Richfield Co. v. Sybert*, 456 A.2d 20 (1983) (no conflict) with *Hill v. Okay Construction Co.*, 256 N.W. 2d 107 (1977) (conflict).
  - (3) Domestic relations. *Coulson v. Coulson*, 448 N.E.2d 809 (1983); *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).
- e. Potential conflict in criminal practice -- representing multiple accused.
  - (1) Ordinarily a lawyer should refuse to act for more than one of several co-defendants (Comment to Army Rule 1.7). *See Standards for Criminal Justice 4-3.5(b)*.
  - (2) Consult AR 27-10 and USATDS SOP for procedures on handling co-accused situation. Generally:
    - (a) Co-accused will initially be contacted by separate defense counsel.
    - (b) Co-accused may submit request for the same individual military counsel.
    - (c) Chief, USATDS decides whether to grant the request. No request will be granted unless each co-accused has signed a statement reflecting informed consent to multiple representation and it is clearly shown that a conflict of interest is not likely to develop.

2. Representation materially limited. A lawyer is also precluded from representing a client if the representation would be materially limited by the lawyer's responsibility to another client, a third party, or by the lawyer's own interests (Army Rule 1.7(b)). Example: Defense counsel materially limited by loyalty to Army. *United States v. Bryant*, 35 M.J. 739 (A.C.M.R. 1992).
    - a. A possible conflict does not preclude representation.
    - b. Representation is permitted if the lawyer reasonably believes that it will not be adversely affected by the interest and the client consents after consultation.
  3. Business transactions. A lawyer shall not enter into a business transaction with a client (Army Rule 1.8).
  4. Former client. A lawyer who has represented a former client shall not thereafter represent another person in the same matter or use information to the disadvantage of a former client (Army Rule 1.9).
- F. Imputed Disqualification (Army Rule 1.10).
1. Lawyers working in the same military law office are not automatically disqualified from representing a client. A functional analysis is required (Army Rule 1.10. Compare ABA Model Rule 1.10.)
  2. Army policy may discourage representation of both parties in certain instances, e.g. AR 27-3, para. 4-9c. (Representation of both parties in a domestic dispute discouraged).

## **VI. OVERVIEW OF AR 27-1 INVESTIGATIONS – PROFESSIONAL RESPONSIBILITY COMPLAINTS.**

- A. Reporting Requirements.
1. A lawyer with knowledge of a violation of a Rule of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness must report the violation (Rule 8.3).

- a. Knowledge = actual knowledge or knowledge inferred from the circumstances.
    - b. Substantial = material matter of clear and weighty importance and does not refer to the quantum of evidence presented.
  - 2. Rule 8.3 does not require disclosure of information protected under Rule 1.6. (confidentiality).
- B. Professional misconduct defined (Rule 8.4).
- 1. Violating or attempting to violate the Rules of Professional Conduct, or knowingly assisting or inducing another to do so;
  - 2. Committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
    - a. Not all criminal offenses constitute professional misconduct.
    - b. Concept of offenses involving moral turpitude is rejected under Rule 8.4.
  - 3. Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation;
  - 4. Stating or implying an ability to influence improperly a government agency or official; or
  - 5. Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
- C. Professional Misconduct distinguished from personal misconduct.
- 1. Cases Normally in the scope of AR 27-1.

- a. Dishonesty – false claims, shoplifting, obtaining false official orders, firearms violations, stalking, or illegal surveillance.
  - b. Sexual misconduct – Bigamy, sexual relationships that involved a conflict of interest, sexual crimes.
  - c. Insulting Behavior – Mismanaging by uttering insulting ethnic or sexual comments, displaying offensive visual material or by inappropriate touching of subordinates, clients, witnesses, or staff workers.
  - d. Dealing with Subordinates – Mismanaging by having personal business transactions with subordinates or imposing on subordinates for personal favors.
- 2. Cases normally not in scope of AR 27-1.
  - a. Discretionary Administrative Action – OERs, NCOERs, award recommendations, pass, or leave actions.
  - b. Personal Misconduct or questionable sexual activity (including adultery) unless it involves mismanagement or is a criminal act that reflects on fitness to practice law.
  - c. DWIs or minor traffic offenses.
  - d. Insulting Behavior – rudeness and name-calling unless directed toward judges or investigating officers or identified above.
  - e. Conduct is being investigated as criminal misconduct, punishable under the UCMJ.
- D. Processing Complaints (AR 27-1, Chap. 7, *See* Appendix A, Processing Chart).
  - 1. Supervisory lawyers at all levels are responsible for reviewing all alleged or suspected violations of the Army Rules of Professional Conduct for Lawyers, or other applicable ethical standards that come to their attention.

- a. Any credible alleged or suspected violation that raises a substantial question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer shall be reported through technical channels to the Chief, Standards of Conduct Office.

- (1) Credible = reasonable belief that a violation occurred.

- (2) Allegations may be resolved at the local level if there is no credible evidence of misconduct. Maintain a copy of any response sent to complainant and all associated documentation in office files.

- b. Several supervisory JAs review allegations up to and including TAJAG before a formal preliminary screening inquiry (PSI) is ordered.

- (1) Each level conducts a credibility check.

- (2) No credible evidence – process stops.

- (3) Credible evidence – forward up the chain.

- 2. Preliminary Screening Inquiry.

- a. Purpose: To assist senior supervisory JAs in determining whether the questioned conduct occurred and, if it did, whether it constituted a violation of AR 27-26, or other applicable ethical standards.

- (1) Not intended to constitute an ethical investigation that most licensing authorities normally require lawyers to report.

- (2) But, it is the responsibility of the subject to know and comply with the reporting requirements of their licensing jurisdiction.

- b. Procedures.

- (1) OTJAG tasking to conduct an inquiry.
- (2) Senior Supervisory JA ( MACOM SJA or other JA in an equivalent supervisory position) appoints PSI officer (senior to subject).
- (3) PSI officer.
  - (a) Procedures set forth in AR 27-1 or AR 15-6 for informal investigations.
  - (b) Determine facts and circumstances of alleged or suspected violation.
    - (i) Can delegate a subordinate officer to gather facts, question individuals, and collect documents.
    - (ii) PSI officer must independently review the facts.
  - (c) PSI officer provides written report to Senior Supervisory JA.
    - (i) Summarize facts.
    - (ii) Provide conclusions as to whether a violation occurred.
      - (a) Preponderance of the evidence.
      - (b) Evidence points to a particular conclusion as being more probably than any other conclusion.
    - (iii) Recommend corrective or disciplinary action, if appropriate.

- (iv) Attach any documentary evidence or witness statements.
- c. Senior Supervisory JA action.
  - (1) Determine if the report is complete, if not return to PSI officer.
  - (2) Action on a complete report.
    - (a) If no violation occurred, coordinate with Chief, SOCO and close the case and notify subject and complainant in writing and provide a copy of the report and correspondence to TJAG.
    - (b) If only a minor or technical violation.
      - (i) Determine if counseling is appropriate.
      - (ii) If so, coordinate with SOCO and refer a copy of the report to the subject for comment.
      - (iii) Ensure counseling takes place.
      - (iv) Inform the complainant in writing of final action.
      - (v) Provide copy of PSI report and subsequent correspondence to TJAGSA.
    - (c) More than a minor or technical violation.
      - (i) Refer the PSI report to OTJAG for further action.

- (ii) OTJAG will refer the file to the subject for comment.

E. OTJAG Action.

1. TAJAG action.

- a. Return the file to the senior supervisory JA for further inquiry.
- b. Appoint a new inquiry officer for a supplemental inquiry.
- c. Determine there was no violation and return to Chief, SOCO to close.
- d. Determine that minor or technical violation occurred and either take appropriate action or direct referral to appropriate supervisory JA for specified action.
- e. Determine a substantial violation is clearly shown, take appropriate action and refer the file to TJAG for possible referral to state bar.
- f. Determine a substantial violation appears to have been committed and refer the file to the Professional Responsibility Committee for an opinion.

2. TJAG action.

- a. If file is referred by TAJAG or the PRC committee, determine the appropriate action to be taken.
- b. Determine whether the conduct should be reported to the subject's licensing authority.

- (1) Notify subject of intended action.

- (2) Allow subject 10 days to show cause.

F. DUE PROCESS.

1. If action is to be taken at OTJAG.
  - a. Subject will get a reasonable time (usually 14 to 21 days) to provide comments.
  - b. Extensions may be granted for good cause by Chief, SOCO.
  - c. Failure to provide comments in the time provided, will constitute waiver.
2. The subject is responsible to know and comply with the requirements of his or her licensing jurisdiction. The finding of even a minor or technical violation may trigger a reporting requirement by imposed by subject's licensing authority even if the initiation of the inquiry didn't.

G. FILING AND RELEASE OF INFORMATION.

1. SOCO maintains the files.
  - a. No PSI necessary – 3 years.
  - b. PSI conducted – 10 years.
    - (1) Shortened to 5 years pending approval of National Archives and Records Administration unless:
      - (a) Subject remains in JALS, or
      - (b) Is the subject of another monitoring, open, or founded file within 5 years of the closed date.

- (2) Shortened to 3 years if unfounded or inquiry-not-warranted.
  - (3) One years after subject leaves JALS (founded files will be kept a minimum for 5 years after the closed date).
- 2. TJAG or TAJAG may file substantiated allegation in Career Management Information File (CMIF).
  - a. Relevant to individual's potential as a member of JALS.
  - b. Documents available to personnel managers.
    - (1) Subject provided notice IAW AR 600-37.
    - (2) Opportunity to rebut filing.
- 3. Release.
  - a. Release IAW with AR 25-55 and AR 340-1.
  - b. Normally, will not release outside DoD.
  - c. **May release to civilian licensing authority if serious professional misconduct.**
  - d. May release to decision-makers within DoD.
    - (1) Promotion to Colonel/General.
    - (2) Involuntary Separation for professional dereliction.

## **VII. CASE LAW NEW DEVELOPMENTS IN PROFESSIONAL RESPONSIBILITY.**

- A. ATTORNEY-CLIENT. *United States v. Spriggs*, 52 M.J. 235 (2000). Release of TDS counsel from active duty constitutes good cause for severance of the attorney-client relationship when an ongoing attorney-client relationship had not been established. TDS counsel represented Spriggs at a prior court-martial resulting in an acquittal. After additional investigation charges were preferred a second time, including a perjury charge based upon testimony at the first court-martial. The original TDS counsel was on terminal leave and had begun work at a civilian law firm when the new charges were preferred. A new TDS attorney was detailed to represent Spriggs. Spriggs spoke telephonically with his first TDS counsel on several occasions regarding the new court-martial. Spriggs asked the first TDS counsel to represent him in the second court-martial. At trial Spriggs accepted the second TDS counsel as his detailed counsel, and made an IMC request for the TDS counsel from his first trial. The request was forwarded to the reserve commander at the Army Reserve Personnel Center. He contacted the first TDS counsel who indicated he was not willing to absent himself from his private law firm. Accordingly, the reserve commander denied the IMC request. CAAF affirmed the decision of the ACCA, holding that Spriggs had not met the threshold burden of proving whether he had an ongoing attorney-client relationship with the TDS counsel from his first court-martial. Since Spriggs did not prove an ongoing attorney-client relationship, the TDS counsel's release from active duty constituted good cause for severing the relationship. CAAF left open the question of whether release from active duty would terminate the attorney-client relationship under all circumstances.

- B. ATTORNEY-CLIENT. *United States v. Golston*, 53 M.J. 61 (2000). Prejudice does not exist merely because trial counsel represented the spouse of the accused in a legal assistance matter. Golston was convicted of indecent acts with two minor children. His wife testified on behalf of her husband that one of the minor girls had a crush on him. During cross-examination the assistant trial counsel brought up a prior incident where Mrs. Golston had been accused of theft. After the case recessed for the day, Mrs. Golston told her husband's trial defense counsel that the trial counsel had represented her with regard to the theft incident in his prior capacity as a legal assistance attorney. Trial defense counsel made a motion for a mistrial the next day, and requested in the alternative that Mrs. Golston's cross-examination be stricken. The military judge questioned trial counsel and assistant trial counsel. He determined that the information about Mrs. Golston was not gleaned from any confidential discussions with her. The military judge denied the motion based upon his questioning of the trial counsel and assistant trial counsel. CAAF held that the trial counsel failed in his duty to avoid the appearance of impropriety concerning his attorney-client relationship with Mrs. Golston. The court specifically noted the failure of the trial counsel to affirmatively raise this issue to the court and opposing counsel. The court found, however, that Golston was not prejudiced by trial counsel's failure to disclose the possible conflict of interest. Affirmed.
- C. INEFFECTIVE ASSISTANCE OF COUNSEL. *United States v. Grigoruk*, 52 M.J. 312 (2000). Defense counsel's failure to use a child psychologist, or any other expert, to challenge complainant's credibility in prosecution for sex offenses raises sufficient claim of ineffective assistance of counsel to require additional inquiry. Grigoruk was charged with sexual molestation of his stepdaughter. He wanted the convening authority to employ Dr. Underwager, a child psychologist, as an expert witness for the defense. The military judge ordered the Government to produce Dr. Underwager or a suitable substitute. Grigoruk's defense counsel never called Dr. Underwager or any other doctor. The case was a classic credibility contest with the accused denying anything happened and a complete lack of physical evidence supporting sexual abuse. After conviction, Grigoruk asked his defense counsel why Dr. Underwager was not called to rebut the allegations of the stepdaughter. Defense counsel explained that he did not call Dr. Underwager because trial counsel had evidence that would make the doctor look like a hired gun. CAAF held that Grigoruk had met the threshold requirement of demonstrating ineffective assistance of counsel for failing to call Dr. Underwager as a defense expert. Accordingly, CAAF remanded the case to the court of criminal appeals to obtain additional evidence including an affidavit from trial defense counsel explaining his failure to call a defense expert. Reversed.

## **VIII. NEWS FROM SOCO.**

- A. Information paper – Ethics and Mismanagement Case Activity, Appendix C.
- B. Information paper - Use and Release of Information in Professional Conduct Files, Appendix D.
- C. Hot Topics from SOCO (See Appendix C,D and E).
  - 1. Communicating with represented parties.
  - 2. Representation of commanders on personal misconduct.
    - a. TJAG written permission required.
    - b. See links page on JAGC net.
  - 3. Information Disclosure.
    - a. FOIA.
    - b. Privacy Act request.
    - c. Discovery.
    - d. Discovery issues in civilian personnel sector. Government refuses to disclose (labor law attorney) Privacy act, FOIA.

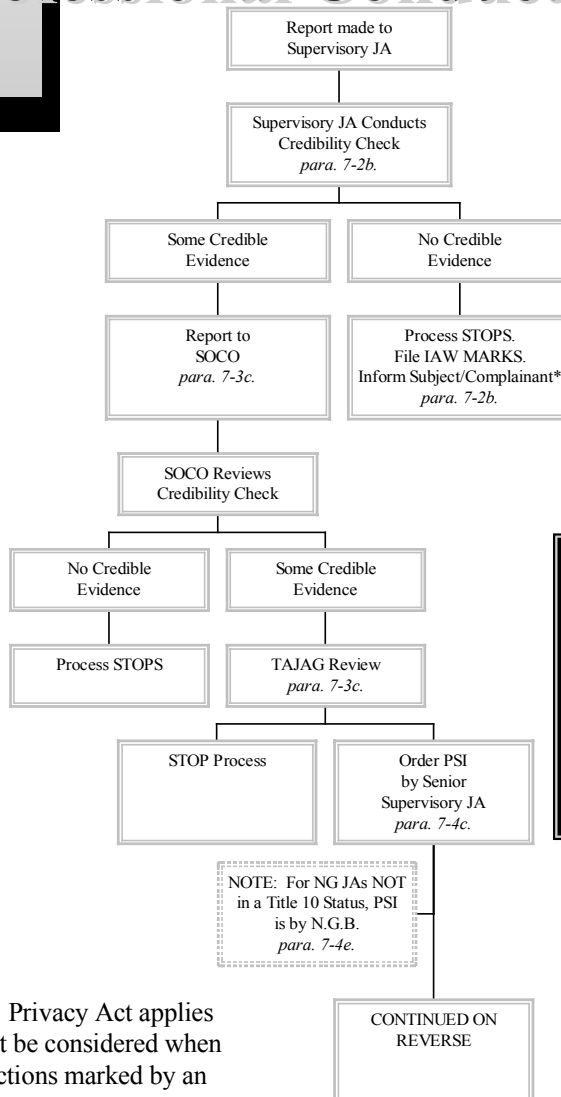
## **IX. CONCLUSION.**



## APPENDIX A

# P Professional Conduct Inquiries

*Chapter 7, AR 27-1, 3 Feb 1995*



### Notes

⇒Standard: Preponderance of Evidence (para. 7-3d.).

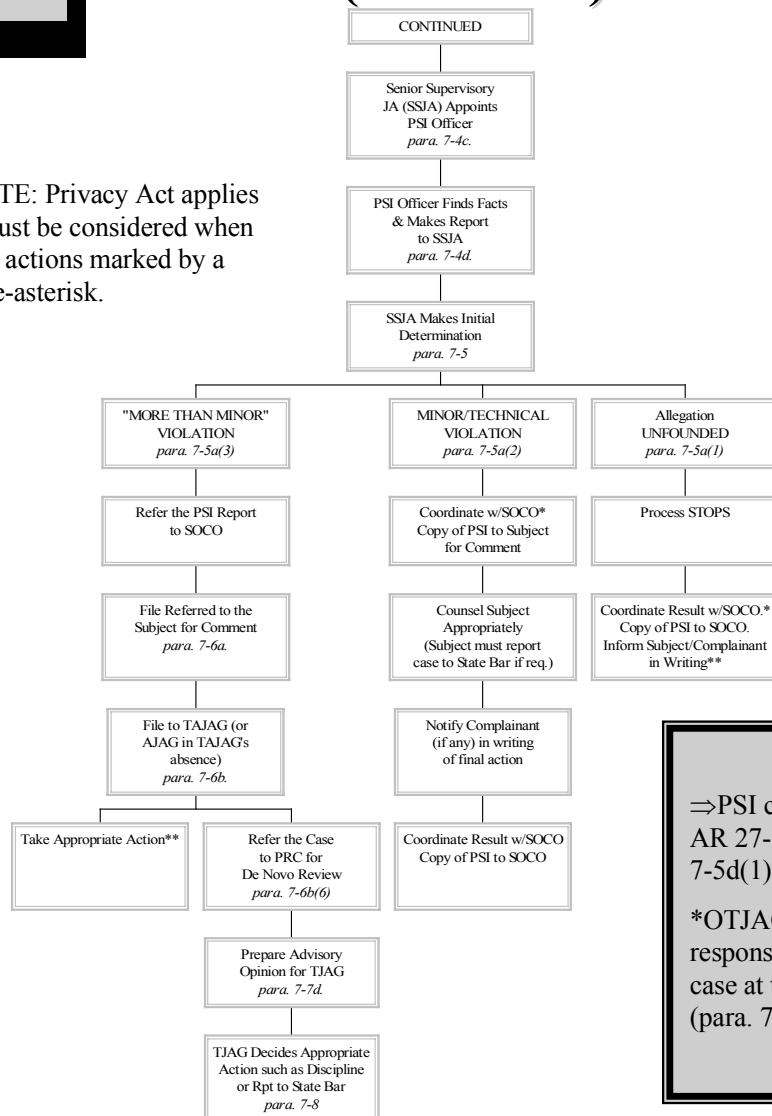
⇒Allegation is “credible” if info provides “reasonable belief.” (para. 7-2b.)

\*NOTE: Privacy Act applies and must be considered when taking actions marked by an asterisk.

# P

## rofessional Conduct Inquiries (continued)

**\*\*NOTE:** Privacy Act applies and must be considered when taking actions marked by a double-asterisk.



### Notes

⇒ PSI conducted IAW AR 27-1 & 15-6(para. 7-5d(1)).

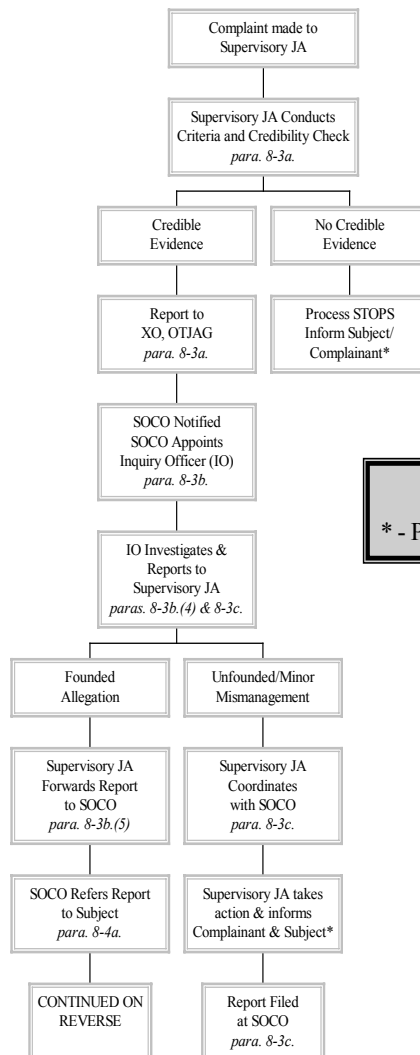
\*OTJAG may assume responsibility for the case at this point. (para. 7-5b.)

## APPENDIX B

# M

## ismanagement Inquiries

*Chapter 8, AR 27-1, 3 Feb 1995*



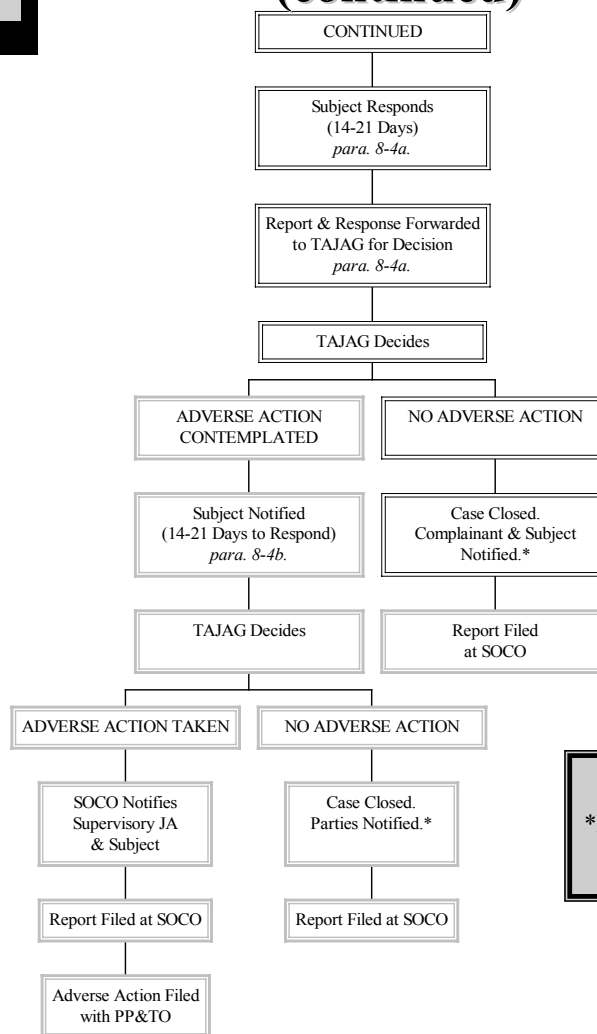
### Notes

\* - Privacy Act Applies

# M

Chapter 8, AR 27-1, 3 Feb 1995

## Management Inquiries (continued)



### Notes

\*Privacy Act Applies.

## APPENDIX C

### INFORMATION PAPER

DAJA-SC  
30 August 2000

SUBJECT: Ethics and Mismanagement Case Activity

1. Purpose. To report the Army Standards of Conduct Office's (SOCO) case activity for September 1999 through August 2000.

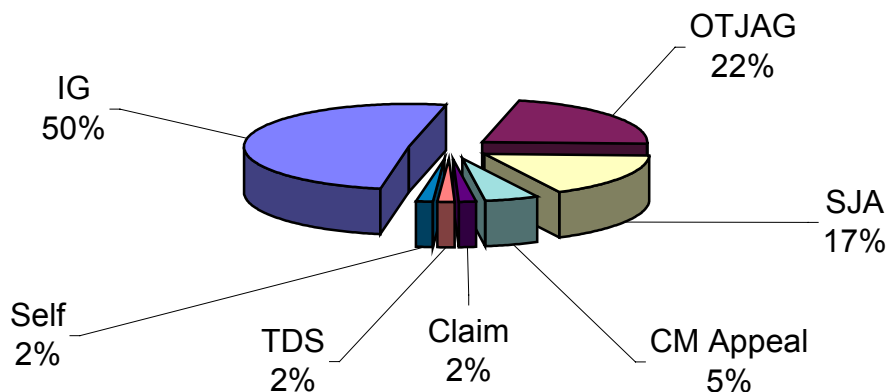
2. Facts.

a. Under AR 27-1, chapters 7 and 8, SOCO's Professional Conduct Branch maintains records on allegations of JALS attorneys' unethical conduct and mismanagement.

b. During the past year, SOCO and supervisory JAs closed a total of 59 ethics and mismanagement cases. 30 complaints came from the IG, 16 complaints were made directly to OTJAG, 9 came from SJAs, 3 from appeals, 1 from a claim, 1 from TDS, and 1 was a self-report. Only eight cases were founded—seven ethics cases and one mismanagement case.

c.

### Complaint Sources Sep 1999 - Aug 2000



IG	OTJAG	SJA	CM Appeal	Claim	TDS	Self	Total
30	13	10	3	1	1	1	59

c. Seven Founded Ethics Cases.

Three active duty JAs were sanctioned:

- *Departing primary duty as command's attorney (conflicts of interest communicating & advising alleged rapist and victim—both personal acquaintances of the command's attorney—; failing to provide Art. 31 warnings; breaching confidentiality)—written reprimand.*
- *Plagiarism (newspaper article)—counseling by SJA.*
- *Incompetence (separation agreement)—counseling by SJA.*

Four RC JAs were sanctioned at the state level:

- *Mismanaging client's trust—state bar public reprimand (NG attorney self-report).*
- *Neglecting and abandoning civilian clients, not refunding fees—state bar 91-day suspension (Retired Reserve attorney—reported to AR-PERSCOM).*
- *Sexually abusing, forcibly sodomizing, and enticing natural children—thirteen years' imprisonment following state conviction (Reserve IMA attorney—TAJAG withdrew certification to practice law in the Army and permanently suspended the attorney from practicing before Courts-Martial & ACCA—notified AR-PERSCOM).*
- *State Ass't AG's illegally sharing evidence of an undercover sting operation with attorney-companion—state indictment & community service diversion (NG attorney).*

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**APPENDIX D**  
**INFORMATION PAPER**

DAJA-SC  
24 May 2000

SUBJECT: Use and Release of Information in Professional Conduct Files

1. Purpose. To explain the policy on the use and release of professional conduct files.

2. Facts.

a. The Standards of Conduct Office (SOCO) maintains all preliminary screening inquiries (PSI) and related documents, including those in which the allegations were unfounded or in which only minor or technical violations were founded.

b. Currently, SOCO destroys professional conduct case files where no PSI was necessary after three years. SOCO destroys PSI files after ten years.

**c. Shortened retention periods, pending approval of National Archives and Records Administration:**

*Five years. Destroy a founded file five years after the closed date, unless the subject either:*

*(1) remains in The Judge Advocate General Legal Service (JALS), or*

*(2) is the subject of another monitoring, open, or founded file within five years of the closed date.*

*Three years. Destroy an unfounded or inquiry-not-warranted (INW) file three years after the closed date.*

*One year after leaving JALS. Destroy a founded file one year after a JALS subject has left the JALS (except that a founded file will be kept for a minimum of five years after the closed date).*

d. Supervising judge advocates must forward copies of all PSIs, including those where the allegations are determined to be unfounded, to SOCO. SOCO retains the files under 10 U.S.C. § 3037(c); R.C.M. 109, Manual for Courts-Martial, 1984; AR 690-300, Position Management; Chapter 7, AR 27-1, Judge Advocate Legal Service; and the Privacy Act systems notice published in the Federal Register at 65 FR 3215 (20 Jan 2000). Retention of these records serves the following purposes—

(1) To assist The Judge Advocate General (TJAG) in evaluating, managing, and regulating the delivery of legal services by personnel under his jurisdiction.

SUBJECT: Use and Release of Information in Professional Conduct Files

(2) To compile monthly and yearly statistics.

(3) To respond to inquiries concerning Army lawyers applying for employment or bar membership. Employers normally ask applicants if they have ever been investigated and, if so, by what agency. With the consent of the applicant, SOCO will related the circumstances of the inquiry to the potential employer or bar.

(4) To protect both the attorneys who were the subjects of allegations and the Army from allegations that the complaints were ignored or not investigated.

(5) To dispose of repetitive allegations.

e. TJAG or The Assistant Judge Advocate General (TAJAG) may file substantiated allegations and other information that is relevant to an individual's potential as an Army lawyer in the Career Management Information File (CMIF). Personnel managers may review information in the CMIF.

f. Individuals have the opportunity to rebut any proposed CMIF filing. This practice parallels the protection of the Privacy Act that allows individuals to amend their records.

g. SOCO may release professional conduct files to decision-makers within DoD. Examples include release of files pertaining to individuals pending promotion to colonel or general officer or facing involuntary separation for professional dereliction. SOCO will disclose on a need to know basis and comply with the Promotion Integrity Act and Privacy Act.

h. Normally, SOCO will not release professional conduct files outside DoD. SOCO may release files pertaining to serious professional misconduct to civilian licensing authorities.

i. These policies reflect a careful balance between individual privacy and use of relevant information in accord with law and regulations.

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**APPENDIX E**  
**INFORMATION PAPER**

DAJA-SC  
24 May 2000

SUBJECT: Hot Topics

1. Purpose. To report hot topics affecting JAs.
2. Facts.

a. *Mandatory Appointments in South Carolina.* Effective 1 July 2000, South Carolina Rule 608 requires all in-state South Carolina attorneys to accept appointments to serve as counsel or guardians ad litem for indigent persons in the circuit and family courts. On 29 Aug 2000, SOCO learned that the Supreme Court of South Carolina has denied the requests for exemptions of in-state, U.S. Navy attorneys. Rule 608(d)(1)(A) exempts "Members who are prohibited by federal or state law from taking such appointments." The rule contains no blanket exemption for Army lawyers. JALS members must have written consent of TJAG before engaging in the private practice of law. The Anti-Deficiency Act and Joint Ethics Regulation (JER) establish conditions for using *official* time and resources. Stay tuned to JAGCNET <<http://www.jagcnet.army.mil/Ethics-Prof>>.

b. *Volunteerism.*

(1) Executive Order 12988 (5 February 1996) provides that "All Federal agencies should develop appropriate programs to encourage and facilitate PRO BONO legal and other volunteer service by government employees to be performed on their own time, including attorneys, as permitted by statute, regulation, or other rule or guideline."

(2) In late 1995, the ABA approved a resolution urging state bars to admit military lawyers specially for the purpose of providing pro bono publico services in association with organized legal service programs. In February 1996, the General Counsel of the Department of Defense, circulated the resolution seeking the service TJAGs' comments. At the time, the General Counsel expressed reservations about military lawyers, not licensed in a particular state, providing services to clients not entitled to military legal assistance. MG Nardotti opposed "any effort to expand pro bono publico services by military lawyers (including during their 'off-duty time') beyond the limits of 10 USC 1044."

(3) In October 1997, another effort was initiated to establish a pro bono policy. PPTO prepared a draft proposal and with TJAG's concurrence circulated it for comment. The draft proposal encouraged judge advocates and civilian attorneys to provide pro bono legal and volunteer services. This effort did not result in any established policy.

SUBJECT: Hot Topics

(4) *Bottom Line.* TJAG permits pro bono work by judge advocates and civilian attorneys on a case by case basis. Attorneys must seek permission in writing to perform outside employment. (Page 56-57 of the JAGC Personnel Policies ).

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